LEK SWEE HUA & ANOR.

v.

AMERICAN EXPRESS INTERNATIONAL INC.

HIGH COURT, SINGAPORE
LP THEAN J
[SUIT NO. 2593 OF 1988 (SUMMONS-IN-CHAMBERS NO. 293 OF 1990)]
28 NOVEMBER 1990

STATUTORY INTERPRETATION: *Whether order for security of costs can be made against co-plaintiffs resident in foreign jurisdiction - Discretion of Court - Order 23 r. 1 Rules of the Supreme Court [Sing].*

CIVIL PROCEDURE: *Security for costs - More than one plaintiff - Whether security can be given by co-plaintiff resident outside the jurisdiction - Rule of practice - Order 23 r. 1 Rules of the Supreme Court [Sing].*

On 2 June 1989, the 2nd plaintiff P2 was ordered to provide security for costs in the sum of $3,000 which he did. On 18 January 1990, the defendant AMEX applied by way of summons-in-chambers for an order that the security for costs be increased to $10,000; the Senior Assistant Registrar (SAR) ordered further security in the sum of $6,000. Hence this appeal.

The issue was whether the amount of security furnished by P2 pursuant to the order of 2 June 1989 should be increased; relying on *D'Hormusgee's* case Counsel for P2 contended that on principle security for costs ought not to have been ordered in this case as the 1st plaintiff, P1 is a Singaporean and is resident in Singapore and P2, although not a Singaporean, is a permanent resident of Singapore.

Held:

[1] (a) Order 23 r. 1 of Rules of Supreme Court is identical with O. 23 r. 1 referred to in *Slazengers* case.

(b) On the basis of the decision of the Court of Appeal in *Slazengers* case the Court has, under O. 23 r. 1(1), jurisdiction at its discretion to order security for costs to be furnished by a foreign plaintiff even where there are co-plaintiffs resident within the jurisdiction. Each case falling within r. 1(1) must be considered and decided on its own facts.

[2] The question is whether P2 is ordinarily resident in Singapore. On the material before the Court, he is not; furthermore, from the way Counsel for the 2nd plaintiff argued the appeal, and, relying on the rule of practice as laid down in *D'Hormusgee*, he was, by implication, conceding that the P2 was not (at that time) ordinarily resident in Singapore.

[Appeal dismissed.]

Cases referred to:

D'Hormusgee & Co. and Isaacs & Co. v. Grey [1882] 10 QBD 13
Slazengers Ltd. & Ors. v. Seaspeed Ferries International Ltd. [1987] 1 WLR 1197 & [1988] 1 WLR 221
Prozelack K.G. v. Porzelack (U.K.) Ltd. [1987] 1 WLR 420
Procon (Great Britain) Ltd. v. Provincial Building Co. Ltd. [1984] 1 WLR 557

Legislation referred to:

Rules of Supreme Court [Sing], O. 16 r. 1, O. 23 rr. 1, 1(1)

For the plaintiff - Harjeet Singh
For the defendant - Axel Chan

JUDGMENT

LP Thean J:

By an order of Court made on 2 June 1989, the 2nd plaintiff was ordered to provide security for costs in the sum of $3,000, and pursuant to the Order the security was provided. The action then progressed further, and on 18 January 1990 the defendant took out an application by Summons-in-Chambers No. 293 of 1990 for an order that the security for the defendant's costs of this action be increased to a sum of $10,000. The application was heard before the Senior Assistant Registrar, who ordered further security in the sum of $6,000 be provided by the 2nd plaintiff, and that amount was assessed up to the stage of summons for directions. Against that order this appeal was brought; I found that the appeal had no merit and I dismissed it with costs.

The only question raised in the application was whether or not the amount of security furnished by the 2nd plaintiff pursuant to the order of 2 June 1989 should be increased. Since the order was made, voluminous cause papers have been delivered and filed and a lot of work appeared to have been generated. From a cursory perusal of the files, it appears to me that a lot more work would have to be carried out before the summons for direction is taken out. Clearly, the amount of $3,000 as security for costs was wholly inadequate, and ought to be increased, and the amount determined by the learned Senior Assistant Registrar is eminently reasonable. Before me, Counsel for the 2nd plaintiff had not shown any reason why the amount should not be increased.

However, Counsel argued that, on principle, security for costs ought not to have been ordered in this case, because the 1st plaintiff is a Singaporean and is resident in Singapore, and the 2nd plaintiff, though not a Singaporean, is a permanent resident here. He relied on the general rule that where there are more than one plaintiff and one or more of them are resident within the jurisdiction the Court would not order security to be given by the co-plaintiff who is resident outside the jurisdiction. He relied on the case of *D'Hormusgee & Co. and Isaacs & Co. v. Grey* [1882] 10 QBD 13. In that case, an action was brought by two plaintiffs, one of whom was resident abroad. The statement of claim alleged a contract by the defendant with the plaintiffs jointly, and in the alternative, with each of the plaintiffs separately. It was held that as one of the plaintiffs was resident within the jurisdiction, the plaintiff resident abroad could not be ordered to give security for costs. It appears that the case was decided on the basis of joinder of parties under O. 16 r. 1 of the Supreme Court Rules than in force and not under any particular rule governing security for costs to be furnished by a plaintiff, who is ordinarily not resident within the jurisdiction.

That case was considered in *Slazengers Ltd. & Ors. v. Seaspeed Ferries International Ltd.* [1987] 1 WLR 1197 and [1988] 1 WLR 221. In that case, three actions were instituted against the defendants, the owners of the "Seaspeed Dora", a roll-on roll-off vessel. The actions arose out of the capsizing of the vessel at Jeddah and were subsequently consolidated. Altogether, 116 plaintiffs claimed against the defendants for damages, and they claimed as owners of the goods, which were loaded on the vessel and which were lost, or as consignees or endorses of the bills of lading. Of that total, 50 or 51 were resident outside the jurisdiction, and they were predominantly the consignees of the various consignments of cargo and the shippers of most of the consignments loaded at Antwerp and Rotterdam. It was common

ground that all the cargo interest were insured and the action was brought in the names of the plaintiffs by the underwriters claiming by subrogation, and many of the underwriters were resident within the United Kingdom; but they were not the parties in the action. The defendants sought an order for security for costs against the foreign plaintiffs. Webster J, who heard the application, examined in depth the rule then found in note 23/1- 3/3 of *The Supreme Court Practice* 1985: "No order will be made if there are co-plaintiffs resident in England" and the authorities in support, including *D'Hormusgee*, and held, *inter alia*, that was not a rule of law but of practice. He allowed the application and ordered the foreign plaintiffs to provide security in the sum based on an aliquot share of the costs attributable to the number of foreign plaintiffs. On appeal, the Court of Appeal agreed with his views on the rule of practice but disagreed with his determination that the foreign plaintiffs should provide security for costs as ordered. Dillon LJ held, *inter alia*, O. 23 r. 1 conferred on the Court a very wide discretion on ordering security for costs. He said, at p. 224:

> ...the present rule R.S., O. 23 r. 1 deals with the matter in wording which makes it plain that the Court has a very wide discretion over ordering security. Leaving out alternatives which are not relevant to this case, O. 23 r. 2 provides:
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> > Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court - (a) that the plaintiff is ordinarily resident out of the jurisdiction... then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.
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> I have no doubt that on that wording there is jurisdiction at the discretion of the Court to order security where some of the plaintiffs are ordinarily resident out of the jurisdiction but others are not if having regard to all the circumstances of the case, the Court thinks it just to do so. The discretion is, therefore, one to be applied to all the circumstances of the case, and the general statement in *The Supreme Court Practice* that no order will be made if there are co-plaintiffs resident in England must be qualified by the existence of that general discretion.

Dillon LJ later went on to consider the question whether security should be ordered in that case, and he said, at p. 226:

> The plaintiffs have resolutely opposed any order for security being made and have come to this Court by way of appeal against the decision of the Judge. The obvious conclusion must be that when this action comes for trial if no security has been ordered, the Judge, if the plaintiffs fail or fail to any extent, must make any order for costs against all the plaintiffs, including those resident in the jurisdiction. They have chosen to stand together and should fall together. That is, of course, the reality of the situation as this is an underwriters' claim.
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> There is no suggestion that the plaintiffs within the jurisdiction, with or without the support of their underwriters, would not be able to meet any order for costs that might be made. They include several apparently very substantial companies.
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> It is an underwriters' action in which the plaintiffs stand together as I have said, and it is plain that if when matters come to trial the plaintiffs fail and the defendants are entitled to an order for costs they are bound to get it as against plaintiffs within the jurisdiction as well as against the plaintiffs outside the jurisdiction. Therefore, while I entirely approve the Judge's decision that he is not limited by an inflexible rule as stated hitherto in *The Supreme Court Practice*, I think he was wrong to order the security which he did order.

Bingham LJ, the other member of the Court, at the commencement of his judgment quoted, at p. 226, the following passage of the judgment of Sir Nicolas Browne-Wilkinson V.C. in *Prozelack K.G. v. Porzelack (U.K.) Ltd.* [1987] 1 WLR 420 at p. 422:

> The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this Court against which it can enforce the judgment for costs.

and continued:

> Where the conditions for ordering security are satisfied, the decision whether or not to make an order and, if so, in what amount is one for the master or district Registrar or Judge, who will take account of all the circumstances of the case and make such order, if any, as appears to him to be just. The direction of the master or district Registrar or Judge is not to be fettered by any inflexible rule: see, for example, *Procon (Great Britain) Ltd. v. Provincial Building Co. Ltd.* [1984] 1 WLR 557. The passage in The Supreme Court Practice 1988, p. 398, para. 23/1-3/3, which Dillon LJ has quoted, accordingly cannot stand without qualification as a statement of legal principle.

Bingham LJ then considered the case before the Court and held that there were ample funds available to satisfy any order for costs awarded to the defendant. He said, at p. 228:

> I turn to the second condition. All these claims, although brought in the names of the plaintiffs, are substantially brought by underwriters who are subrogated to the plaintiffs' claim. We have seen a list of the underwriters. The very large majority are Lloyd's syndicates. There are some other English insurers and some foreign insurers. There is every reason to think that there is an ample fund available within this country against which an order for costs could be enforced. No previous instance has been brought to our attention in which there has been difficulty in obtaining satisfaction of an order in circumstances of this kind. That I regard as a fact of some significance.

Order 23 r. 1 of our Rules of Supreme Court is identical with O. 23 r. 1 referred to in *Slazengers* and, in so far as relevant, provides:

> 1. (1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court:
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> (a) that the plaintiff is ordinarily resident out of the jurisdiction; or
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> then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

On the basis of the decision of the Court of Appeal in *Slazengers Ltd. & Ors. v. Seaspeed Ferries International Ltd.*, the Court has under O. 23 r. 1(1) jurisdiction at its discretion to order security for costs to be furnished by a foreign plaintiff even where there are co-plaintiffs resident within the jurisdiction. Each case falling within r. 1(1) must be considered and decided on its own facts.

I now turn to the facts in the present case. The 1st plaintiff is a Singaporean and is resident in Singapore. But, at the date of the hearing of the application, a bankruptcy notice had been taken out against her, and the service of bankruptcy notice on her had not been successful. Form the affidavit of service produced, it appears that there had been difficulties in effecting service of the bankruptcy notice on her. As for the 2nd plaintiff, at that time two bankruptcy notices had been taken out against him, and there were also difficulties in effecting service of process on him at the address at which he said he was residing. He claimed that he was granted the status of a permanent resident in Singapore; that is by no means conclusive or even convincing. The question is whether he is ordinarily resident in Singapore.

On the material before me, I am not satisfied he is. Furthermore, from the way Counsel for the 2nd plaintiff argued the appeal before me, and, in particular, in relying on the rule of practice as laid down in *D'Hormusgee*, he was, by implication, conceding that the 2nd plaintiff was not (at that time) ordinarily resident in Singapore.

For the reasons I have given, I entirely agree with the decision of the learned Senior Assistant Registrar and the increase in the amount of security was amply justified.

Also found at [1991] 1 CLJ 412